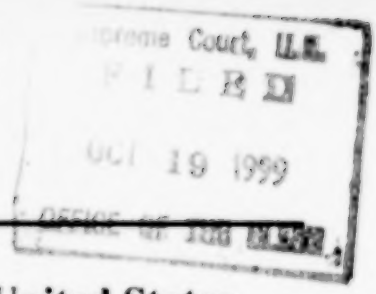

No. 98-2060

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The State of Ohio seeks this Court's review of a published decision of the Sixth Circuit, which held that a federal habeas court may properly view an ineffective-assistance-of-counsel claim as the "cause" for a habeas petitioner's procedural default of some other habeas claim, even when the ineffective-assistance claim is itself procedurally defaulted. According to the court of appeals, as long as the ineffective-assistance claim was *presented* to the State's courts, a federal court may address the merits of that claim even though the habeas petitioner presented it to the State's courts long after the deadline for doing so had passed. Pet. App. at 11a.

That decision runs counter to the deference to State procedural rules embodied in federal habeas law, and is not supported by this Court's decisions or the decisions of other federal courts. Yet respondent Carpenter claims in his brief in opposition that the question presented is "not important," Br. in Opp. at 1, and he argues that the decision below is "not inconsistent" with those of other circuits. *Id.* at 6, 7. He is wrong.

First, respondent suggests that federal courts should treat a habeas petitioner's procedural default of an ineffective-assistance claim differently from other procedural defaults, but he can point to no decisions from this or any other court (save the one below) that say so. He starts off well enough when he notes that a "federal habeas court will not consider the merits of [a procedurally-defaulted] claim unless [a habeas petitioner] can demonstrate 'cause' for the procedural default and 'prejudice' resulting therefrom," Br. in Opp. at 2 – a view we surely do not dispute – but he then argues that a procedurally-defaulted ineffective-assistance claim need not be subjected to the same cause and prejudice analysis. Rather, he claims, "it is sufficient that he has presented the issue of ineffective assistance to the state courts," Br. in Opp. at 2, regardless, it seems, of the State's own rules for the timely presentation of such claims, and regardless of the cause for his failure to comply with those rules. That view of the law aptly summarizes the judgment below, but hardly explains why it is the right one, or why the question is not an important one.

Surely this Court has never taken such a view, and indeed in a per curiam summary reversal earlier this year, the Court (unlike the court below in our case) applied the cause

and prejudice test to procedurally-defaulted ineffective-assistance claims. *See Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). The Court said in that case:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause, also fails. . . . [T]he ineffective assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to a state procedural rule . . . and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review.

119 S. Ct. at 1021.

The same can be said of the ineffective-assistance claims in *this* case, for, as even the court below acknowledged, Ohio's state courts had "denied the [ineffective-assistance] claim based on procedural default" because Carpenter had "filed the claim late, and according to the state court, without good cause for his delay." Pet. App. at 11a. Yet though Carpenter "failed to demonstrate cause or prejudice for his failure to raise th[is] claim[]" in accordance with the relevant "state procedural rule," *Stewart v. LaGrand*, 119 S. Ct. at 1021, the court below in our case never even looked to that cause and prejudice question, holding that Carpenter need only show that his defaulted ineffective-assistance claim "was presented to the state courts and . . . is exhausted." Pet. App. at 11a. In light of the Court's application of the cause and prejudice test to procedurally-

defaulted ineffective-assistance claims just this year in *LaGrand* – and the failure of the court below to do likewise – review of the judgment below (or perhaps even a summary reversal, as in *LaGrand*) is now appropriate, as the Sixth Circuit's new approach to the review of procedurally-defaulted ineffective-assistance claims applies not just to this case, but to every habeas case in which similar claims are raised.

Though respondent Carpenter relies on *Murray v. Carrier*, 477 U.S. 478 (1986), that case says nothing about an exception to the cause and prejudice test for procedurally-defaulted ineffective-assistance claims. If all other procedurally-defaulted claims must pass the cause and prejudice hurdle before a federal court can review them, why must not procedurally-defaulted ineffective-assistance claims? Neither respondent nor the court below offers any explanation for their view that those latter claims are different.

And respondent's trumpeting of "comity," Br. in Opp. at 2, is strange indeed, given his view in this case that federal courts ought to be free to review procedurally-defaulted claims that State courts themselves have refused to examine, regardless of the cause for the default. Where a "petitioner makes no attempt to demonstrate cause or prejudice for his default in state . . . proceedings, his claim is not cognizable in a federal suit for the writ." *Gray v. Netherland*, 518 U.S. 152, 162 (1996). That principle embodies the respect for and recognition of state procedures that "comity" refers to, and the decision below does not embrace that view at all.

No one disputes respondent's claim that the "question of whether a habeas petitioner has demonstrated adequate 'cause' within the meaning of the 'cause' and 'prejudice' exception to the waiver rule is a matter exclusively within the province of the federal courts." Br. in Opp. at 2. We have never suggested otherwise. But the problem here of course is that the court of appeals ignored the cause and prejudice test entirely when examining respondent's procedurally-defaulted ineffective-assistance claim. All agree that federal courts enjoy the *power* to apply the cause and prejudice test, but the question here is whether they have an *obligation* to do so when presented with procedurally-defaulted claims. Aside from the court below, all courts to examine the question have agreed that, absent some cause for the procedural default of an ineffective-assistance claim, such a claim cannot be used as cause for the procedural default of some other habeas claim.

As for the statute of limitations argument in respondent's brief, it is true that a one-year limitations period applies to the filing of new habeas petitions today. Br. in Opp. at 3. But the fact remains that the court below has now revived a procedurally-defaulted sufficiency-of-the-evidence claim dating from 1990. And even for post-AEDPA claims, the tolling provision in 28 U.S.C. 2244(d)(2) ("[t]he time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection") could still permit long-since-defaulted ineffective-assistance claims to come back to life. Here's how: even under AEDPA's new time limits, a defendant like Carpenter convicted today could toll the running of the one-year limitations period by pursuing

a variety of state postconviction remedies (relying on 28 U.S.C. 2244(d)(2)), and while those proceedings were pending in the state court system (and perhaps well after 365 days had passed from the completion of his direct appeal), he could file (as he did in our case) an untimely application to reopen his direct appeal under Rule 26(B) of the Ohio Rules of Criminal Procedure. Once the state court of appeals dismissed that application as untimely, the defendant would be free (according to the judgment below in this case) to include an ineffective-assistance-of-appellate-counsel claim in his habeas petition (and rely on that procedurally-defaulted claim as "cause" for other procedural defaults) whenever he filed his habeas petition (which he would do once his other state postconviction claims were dismissed, thereby restarting the one-year clock under 28 U.S.C. 2244(d)(2)).

The one-year limitations period in AEDPA does not eliminate the problem, which stems not from the staleness of Carpenter's claims (though they are indeed old), but from the court of appeals' refusal to respect the State's procedural rules for raising ineffective-assistance claims. If, as was true here, respondent's claim came too late for state-court review, it should likewise be unreviewable in federal habeas, absent some cause for the default. The federal habeas limitations period helps, but the State's authority to set and enforce its own 90-day limitations period for raising ineffective-assistance-of-appellate-counsel claims deserves no less respect in federal court than it receives in State court. The judgment below says otherwise, and AEDPA's new limitations period will not correct that problem.

Finally, respondent suggests that other federal courts view the question presented just as the court below does. He

is wrong. None of the circuit or district court opinions cited in our petition state or even hint that mere presentation of an already-defaulted ineffective-assistance claim to a state court is sufficient, as the court below held. None of the other decisions we cite says that procedurally-defaulted ineffective-assistance claims can be used in federal habeas to excuse the procedural default of other claims, and none of those other decisions says that procedurally-defaulted ineffective-assistance claims are exempt from the cause and prejudice analysis applicable to all other procedurally-defaulted claims. The decision below is an outlier, and finds no support in decisions of this Court or other federal courts. No other federal court of which we are aware has allowed a habeas petitioner to flout a State's procedural rules in this way, and then reviewed his procedurally-defaulted ineffective-assistance claim anyway (and done so without regard to the cause for the state court default of that claim). That approach is not one that other circuits have chosen to follow, and in light of this Court's decisions in *Murray* and now most recently in *LaGrand*, it is one that we can confidently say no published decision supports. Respondent surely offers no evidence to the contrary.

The principles of comity and federalism mean little if a State prisoner can ignore the State's procedural rules for raising an ineffective-assistance claim – rules which provide the State with an independent and adequate basis for dismissing the prisoner's claim – only to have a federal court revive the claim later, regardless of the cause for the prisoner's procedural default in State court. Once respondent Carpenter defaulted on both his sufficiency-of-the-evidence claim (in 1991) and on his ineffective-assistance claim (in 1993), the State ought to have been able to count on the

finality that its rules for raising such claims gave it when Carpenter filed his habeas petition in 1996. But now the one defaulted claim has propped up the other, and the case is back to square one in the state trial court.

As the 25 amici States supporting our petition have explained, the question presented is indeed of great importance. The court of appeals' approach – one likely to play out in many other habeas cases whenever procedurally-defaulted ineffective-assistance claims are raised – is not consistent with this Court's long-standing approach to habeas cases: "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). This Court should grant certiorari to consider whether – and ultimately confirm that – ineffective-assistance claims are *not* exempt from well-settled habeas doctrine just because the habeas petitioner invokes the ineffective-assistance claim as cause for the default of another claim. Either the court below is correct or all the other courts to address the question are, but in either case, that question is an important one that merits the Court's attention now.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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